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## Thoughts About Judging

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*United States Court of Appeals for the Second Circuit*

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# THOUGHTS ABOUT JUDGING

*Henry J. Friendly\**

THE JUDGE. By *Patrick Devlin*. Oxford: Oxford University Press. 1979. Pp. xi, 201. £7.50.

Lord Devlin's latest book is built upon seven lectures delivered to different audiences in England over a three-year period. Naturally, therefore, "The Judge" is the English judge. From the standpoint of an American reader, this produces excessive emphasis on Lord Devlin's distaste for the judgment of the House of Lords, unanimous in result although not in reasoning, in *Stafford v. D.P.P.*,<sup>1</sup> discussed below. After being carried along through 200 pages of Lord Devlin's consistently witty and sparkling prose,<sup>2</sup> this reviewer ended without an altogether clear comprehension of his notion of what an English appellate judge should do in a situation when rigorous adherence to precedent or to the letter of a statute would produce what he deemed an unfortunate result.

Lord Devlin seems to have moved at least some distance from his declaration of 1962 that the common law "cannot abrogate an existing principle of law and I doubt whether it is now ever likely to invent a completely new one."<sup>3</sup> This may be due, in some measure, to the liberating influence of Lord Chancellor Gardiner's extra-judicial pronouncement in 1966 that the House of Lords will no longer hold to the practice that it cannot overrule an earlier decision, a change in policy given effect in *Conway v. Rimmer*.<sup>4</sup> Lord Devlin indicates that, even without the Lord Chancellor's pronouncement, he would have felt free, had he continued as a Lord of Appeal in Ordinary, to make changes in rules of evidence and procedure (p.

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1. [1974] A.C. 878.

2. To take just one example, his assault upon *Stafford*, delivered at a lecture at All Souls College, Oxford, begins:

Today is the feast of the great Saint Anthonasius, the scourge of heretics, who died this day sixteen hundred and five years ago after much wielding of the anathema. So it is a day on which a man can pluck up his courage and challenge even a unanimous decision of the House of Lords.

P. 148. One wonders how many among even the distinguished fellows of All Souls had realized that May 2 was the feast of St. Anthonasius!

3. P. DEVLIN, *SAMPLES OF LAWMAKING* 113 (1962).

4. [1968] A.C. 910.

14), agreeing in that respect with the minority in *Myers v. Director of Public Prosecutions*.<sup>5</sup>

Lord Devlin's current views on the proper approach to a conflict between precedent or the letter of a statute and the judge's opinion as to the desirable result<sup>6</sup> appear in his first lecture, "The Judge as Lawmaker," delivered in 1975 (pp. 1-17). Instead of the position of 1962, Lord Devlin now limits his veto to "judicial creativity or dynamism," to wit, "judicial operations in advance of the consensus" (p. 9), as distinguished from "judicial activism." In developing this theme, he draws a sharp distinction between common law and statute law.

With respect to statute law, Lord Devlin first states that the judge must not do anything but "interpret and apply" (p. 9). However, he immediately qualifies this by saying that "[w]hen the consensus behind the purpose of a statute is clear and strong, a judge could perhaps risk — later on I shall stress the risk — going beyond interpretation towards development." In contrast, if the statute is controversial, "a judge must be very cautious about any extension of the written word" (p. 10). The basis for this interesting distinction apparently is an assumption that in the former case the legislature was willing to leave "development" to the judges because it did not care overly much about the precise boundaries, whereas in the latter case the judges should leave things exactly as the legislature said (assuming — and this may be a larger assumption than Lord Devlin acknowledges — that the court can decipher this) because controversial legislation is likely to reflect either a compromise or a victory over a substantial minority. Lord Devlin does not say what he believes a judge should do when literal interpretation of even controversial legislation would produce a clearly perverse result. Although Lord Devlin remains "unconvinced that there is anything basically wrong with the rule of construction that words in a statute should be given their natural and ordinary meaning" (p. 14), he limits this rule both by stating that it "does not insist on a literal interpretation or require the construction of a statute without regard to its manifest purpose" and by approving a characteristically sensible

5. [1965] A.C. 1001. The speeches of the majority, which included Lord Reid, with respect to the dire portents of creating a new exception to the hearsay rule, make strange reading for an American appellate judge. See L. JAFFE, *ENGLISH AND AMERICAN JUDGES AS LAW MAKERS* 28-29 (1969).

6. When I speak of the desirable result, I am not, of course, suggesting free-wheeling law-making or departure from controlling precedents simply to take care of peculiarly sympathetic cases, but rather the establishment of new principles of law thought to be better attuned to other developments, whether legislative or judicial. Examples in this country are the creation of strict products liability and the abolition of immunity for charitable institutions.

judgment of Lord Diplock in *Regina v. National Insurance Commissioner*,<sup>7</sup> where the latter endorsed "a purposive approach to the Act as a whole to ascertain the social ends it was intended to achieve and the practical means by which it was expected to achieve them." This, after all, is not really different from the approach long taken by American judges who have expressed disdain for the plain meaning rule. Judge Learned Hand wrote in his early days that statutes should be read "not as theorems of Euclid, but with some imagination of the purposes which lie behind them,"<sup>8</sup> and later admonished that "statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning."<sup>9</sup> Justice Holmes had stated even earlier that "the general purpose is a more important aid to the meaning than any rule which grammar or formal logic may lay down."<sup>10</sup>

A good illustration of how Lord Devlin's approach would lead to a result different from that of at least some American judges is *United States v. Hutcheson*.<sup>11</sup> The question was whether certain labor activities could be the subject of a criminal prosecution under the Sherman Act. In the Norris-LaGuardia Act, enacted in 1932, Congress had deprived the federal courts of jurisdiction to enjoin such activities. Since that statute was highly controversial and Congress had spoken only of injunctions and not of criminal prosecutions, Lord Devlin would surely say that a court should go no further.<sup>12</sup> Mr. Justice Frankfurter, writing for a Supreme Court majority of six, took a different view, stating that the Norris-LaGuardia Act made it unnecessary to determine "whether the conduct is legal within the restrictions which *Duplex Printing Press Co. v. Deering* gave to the immunities of § 20 of the Clayton Act." For then "[i]t would be strange indeed that although neither the Government nor [the employer] could have sought an injunction against the acts here challenged, the elaborate efforts to permit such conduct failed to prevent criminal liability punishable with imprisonment and heavy fines."<sup>13</sup> In addition to other considerations, Lord Devlin would

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7. [1972] A.C. 944, 1005.

8. *Lehigh Valley Coal Co. v. Yensavage*, 218 F. 547, 553 (2d Cir. 1914), *cert. denied*, 235 U.S. 705 (1915).

9. *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir. 1945).

10. *United States v. Whitridge*, 197 U.S. 135, 143 (1905).

11. 312 U.S. 219 (1941).

12. *Cf. United States v. Hutcheson*, 312 U.S. 219, 245-46 (1941) (Roberts, J., dissenting) ("The construction of the act now adopted is the more clearly inadmissible when we remember that the scope of proposed amendments and repeals of the antitrust laws in respect of labor organizations has been the subject of constant controversy and consideration in Congress.").

13. 312 U.S. at 233-34.

doubtless feel that the prominent role Justice Frankfurter had played in securing enactment of the Norris-LaGuardia Act while a law professor<sup>14</sup> should have led him to be particularly cautious in going beyond what Congress had been persuaded to enact. On the whole, despite my admiration of Justice Frankfurter, I here come down on what I think would be Lord Devlin's side.<sup>15</sup>

While I thus understand and in some measure agree with Lord Devlin's views of the proper role of the judge in statutory interpretation, I cannot be certain just what he is trying to tell us with respect to decisions at common law. There he thinks activism is appropriate if "it operates within the consensus" (p. 10), but not if it goes outside it. The difficulty is that he does not indicate precisely what he means by consensus in this context. Lord Devlin suggests that his requirement is satisfied when a decision adopts a view that the judge can be confident all or almost all laymen would share and also when most laymen have no view one way or the other on the issue before the court. He gives as an example of the former situation the question whether a man may "recover damages from a friend who has given bed and breakfast to his deserting wife" (pp. 10-11). Even if we should go along with Lord Devlin in assuming a nearly universal consensus for a negative answer, could we be so confident of one with respect to, say, the abolition of interspousal immunity for torts or the rule prohibiting one spouse from testifying against another in a criminal case?<sup>16</sup> As Justice Story wisely observed, "It is one thing to believe a doctrine universally admitted, because we ourselves think it clear; and quite another thing to establish the fact."<sup>17</sup> On the very next page Lord Devlin seems to suggest a slightly different notion, namely, that the requirement of consensus is satisfied if the tribunal is confident that taking a new path revolutionary in the legal

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14. As is well known, the act stemmed largely from F. FRANKFURTER & N. GREENE, *THE LABOR INJUNCTION* 210-28 (1930).

15. See my discussion in *Mr. Justice Frankfurter and the Reading of Statutes*, reprinted in *BENCHMARKS* 196, 220-22 (1967).

In addition to the considerations there stated, the Court's analogy between criminal prosecutions and injunctions was far from perfect. See Comment, *Restraint of Trade: Labor Disputes and The Sherman Act*, 29 CALIF. L. REV. 399, 402 n.18 (1941). One of the chief objections to federal injunctions against labor activities was that a person alleged to have violated such an injunction was "tried by the same judge who issued the injunction and was not entitled to the benefit of a jury of his peers." A. COX, D. BOK & R. GORMAN, *LABOR LAW* 65 (8th ed. 1977).

16. As to the former, see W. PROSSER, *THE LAW OF TORTS* § 122, at 859-64 (4th ed. 1971); as to the latter, see *Trammel v. United States*, 445 U.S. 40 (1980), *overruling* *Hawkins v. United States*, 358 U.S. 74 (1958).

17. J. STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 1289, at 167 n.2 (1833).

world will not cause much public uproar (p. 11).<sup>18</sup> This strikes me as a poor guide. Few changes in common-law rules are likely to cause the public to take to the barricades. Even when a change in the common law may seem at first blush to be popular, this might not be so if the public were informed of its consequences. For example, the public might be less enthusiastic about absolute products liability if informed that it is not a free lunch and that more damage awards to the relatively few victims may involve higher costs to all. More helpful factors to consider in deciding whether *stare decisis* requires adherence to an old rule that a judge no longer deems just are whether change has been prefigured by decisions on related issues or by statutory reform, the prospects for legislative action (unless, of course, the dimness of the prospects can fairly be attributed to opposition to change rather than to legislative preoccupation with other matters), and the extent to which the change will harm persons who have acted in reliance on the old rule (unless the court gives its decision solely prospective application, a technique of which Lord Devlin disapproves (p. 12) but which American courts are employing with increasing frequency<sup>19</sup>).

The title of the lecture "The Judge and Case Law" (pp. 177-201) affords some promise of further enlightenment on the freedom of appellate judges. The promise is largely unfulfilled, although the lecture contains some interesting thoughts. Lord Devlin's ire had been aroused by a passing remark of Lord Chief Justice Widgery in *Regina v. Turnbull*,<sup>20</sup> a judgment in which the Court of Appeal laid down "guidelines" with respect to prosecutions resting primarily on eyewitness identifications. Acknowledging that the court had "tried to follow the recommendations set out in the Report which Lord Devlin's Committee made to the Secretary of State for the Home Department in April 1976," Lord Widgery stated that it had not "followed that report in using the phrase 'exceptional circumstances' to describe situations in which the risk of mistaken identification is

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18. He cites as examples *Donoghue v. Stevenson*, [1932] A.C. 562, the British equivalent of *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916), and the guidelines with respect to punitive damages laid down in *Rookes v. Barnard*, [1964] A.C. 1129, in which he participated.

19. See, e.g., *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975) (rejecting contributory negligence in favor of comparative negligence); *Williams v. Detroit*, 364 Mich. 231, 111 N.W.2d 1 (1961) (overruling doctrine of municipal immunity from tort liability); *Thill v. Modern Erecting Co.*, 284 Minn. 508, 170 N.W.2d 865 (1969) (overruling doctrine that wife has no separate cause of action for loss of consortium as a result of negligent injury to her husband); *Schwartz v. U.S. Rubber Corp.*, 112 N.J. Super. 595, 272 A.2d 310 (Super. Ct. Law Div. 1971), *aff'd*, 118 N.J. Super. 128, 286 A.2d 724 (Super. Ct. App. Div. 1972) (abolishing parental immunity from tort liability arising out of automobile accidents).

20. [1977] 1 Q.B. 224.

reduced" by the existence of other evidence since "[i]n our judgment the use of such a phrase is likely to result in the buildup of case law as to what circumstances can properly be described as exceptional and what cannot" and "[c]ase law of this kind is likely to be a fetter on the administration of justice when so much depends upon the quality of the evidence in each case."<sup>21</sup> Lord Devlin finds it "a great shock to read of a Lord Chief Justice of England, speaking for a court of appeal of five, and saying, as it seems, that the common law fetters the administration of justice" (p. 177).

This would indeed be a shock, but I do not read the Lord Chief Justice as having said anything of the kind, although he might have chosen his words more carefully. The court had already laid down guidelines to govern the conduct of trial judges, guidelines from which American courts could profit. All that Lord Widgery was saying was that the instances in which eyewitness identifications are reasonably reliable are so varied that it would be unwise to seek to encapsulate them in a single and not particularly apt phrase. Since, in addition, the entire discussion was unnecessary to the judgment, considerable hypersensitivity is needed to perceive Lord Widgery's comment as a frontal attack on the basic premises of the common law. Indeed, the court's careful differentiation of the cases of *Turnbull* and *Camelo*, where it dismissed the appeals, and those of *Whitby* and *Roberts*, where it allowed them, furnishes a splendid basis for the development of case law, despite the rejection of the precise formulation proposed by Lord Devlin's Committee.<sup>22</sup> As Lord Devlin shrewdly observes elsewhere, "a reported judge may make law whether he wants to or not. The only way in which he can make quite sure that one of his decisions does not get used as a precedent is to give no reasons for it" (p. 180).

A final word should be said about Lord Devlin's attack on *Stafford v. Director of Public Prosecutions*.<sup>23</sup> Although the decision turned in large part on the wording of the Criminal Appeal Act of 1964 and to that extent is of limited interest to American readers, the same basic problem also arises where, as in the federal and most state systems, the power of an appellate court to reverse a conviction and order a new trial is less shackled by detailed statutory provisions than in England. Basically the question is this: When a defendant who has been properly convicted presents "fresh evidence" not

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21. [1977] 1 Q.B. at 231.

22. American courts are doing exactly this with the "guidelines" supplied in *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972). See, e.g., *Chavis v. Henderson*, 638 F.2d 534 (2d Cir. 1980).

23. [1974] A.C. 878.

available at his trial, is the proper test for an appellate court whether the evidence would create a reasonable doubt in its own mind, as the House of Lords held in *Stafford*, or whether it might have created such a doubt in the minds of a reasonable jury, as Lord Devlin strongly asserts?<sup>24</sup> Although most American courts would follow Lord Devlin's approach,<sup>25</sup> I cannot find the *Stafford* decision so egregious as he maintains. Surely it is going too far to assert that the decision means that a man can now be convicted in England without a guilty verdict by a jury (pp. 157-58). There was such a verdict against Stafford, admittedly a sound and proper one on the evidence before the jury. The question is how judges should characterize the nature of their inquiry into new evidence that was not before the jury — whether they should ask how it would affect them or how they think it would have affected the jury. One must wonder how important the difference really is. When the "fresh evidence" is palpably weighty, either phrasing will result in a reversal; when it is of slight consequence, neither will. In the residue how else is the appellate judge to determine what a reasonable jury might or could do except by asking himself what he would have done if he had been on the jury? Granted that "any judge who has presided over an appreciable number of jury trials will remember cases in which he had no reasonable doubt but the jury had" (p. 161), he will also remember almost as many where he had a reasonable doubt but the jury had not and a great majority in which he and the jury agreed.<sup>26</sup> On what basis is he to say that although the fresh evidence would not create a reasonable doubt in his mind in the particular case, it would, could,

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24. A more precise phrasing might be "of a sufficient number of reasonable jurors" to avoid a conviction. See *United States v. Miller*, 411 F.2d 825, 832 (2d Cir. 1969).

25. A defendant seeking a new trial because of newly discovered evidence must ordinarily show that the evidence would probably produce an acquittal in the event of retrial. See *Berry v. State*, 10 Ga. 511, 527 (1851); 8A J. MOORE FEDERAL PRACTICE ¶ 33.03 (2d ed. 1980 rev.). Cf. *Harrington v. California*, 395 U.S. 250, 254 (1969) (determination whether improper admission of confessions constitutes harmless error "must be based on our own reading of the record and on what seems to us to have been the probable impact . . . on the minds of an average jury"). In general, a defendant is not entitled to a new trial if the freshly discovered evidence is "merely cumulative or impeaching." *Mesarosh v. United States*, 352 U.S. 1, 9 (1956).

In certain circumstances a lesser showing of materiality is sufficient to obtain a new trial. Many courts apply a less stringent standard to new trial motions based on evidence establishing that false testimony was given at trial. See *Larrison v. United States*, 24 F.2d 82, 87 (7th Cir. 1928); 8A J. MOORE FEDERAL PRACTICE, *supra*, at ¶ 33.03. The burden on the defendant is also lighter where the evidence in question was known to the prosecution during the trial and not disclosed to the defense, particularly if the evidence should have alerted the prosecutor that his case may have included perjured testimony or if the evidence was specifically requested by the defense before trial. See *United States v. Agurs*, 427 U.S. 97, 111 (1976).

26. See H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* 182-90 (1966) (suggesting a differential in the range of 11% between the actual determinations of the jury and the putative determinations of the judge).



or might in the mind of a reasonable juror? The choice of the verb by which the inquiry is put, to which Lord Devlin gives little attention, seems more important to me than the choice of the mind sought to be plumbed. In sum I do not think the historic liberties of Englishmen have been threatened by *Stafford v. Director of Public Prosecutions*, whether the decision was right or wrong under the language of the Criminal Appeal Act.